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No. 94-1104

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BW PARKWAY ASSOCIATES PARTNERSHIP, PETITIONER,

vs.

THE UNITED STATES, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY TO BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI

REPLY TO STATEMENT OF THE CASE

The Government has lost sight of the meaning of the Fifth Amendment. If government uses private citizen's land to accomplish a public objective, a taking has occurred and the government is required to pay just compensation for the economic loss suffered by the private citizen. In this case, a private citizen had 255 acres of undeveloped land that was suitably zoned for large scale commercial and residential development. The Government admits that once the parcel was amassed, "NSA grew concerned that private development of the tract would compromise

the security of NSA operations." Gov. Op. at 2. The Government suggests "[t]he Agency became interested in maintaining the property as a sparsely developed buffer zone for its headquarters." *Ibid.* That is a pale version of the truth.

From 1968 on, high level Government officials recited: "The security requirements of this Agency are such that we must ensure against <u>any</u> commercial development of this tract." Letter from Chief to Phillips, October 14, 1968 (emphasis added). Technical Vulnerability studies were done in 1967, 1970, 1971, 1975, and 1985, and NSA's own witness testified that all of the studies indicated that it was in the best interest of NSA to have a security buffer zone. Czaplicki Deposition 1/25/92 at 29-31. Czaplicki's testimony states that "any fixed location" on BWPA's property "posed a potential threat for national security." *Id.* at 83. It is a flagrant lie for the Government to say that NSA merely wanted BWPA's property sparsely developed--the Government opposed all forms of development and in the Government's own words, "worked to prevent any proposed, feasible development." Gov. Op. at 3.

The Government's largest and most secret agency, the NSA, was able to command its vast resources to conceal the lengths to which NSA would go to prevent development from occurring on BWPA's property.

Rather than use Government resources to pay just compensation for land the Government did not want developed, the Government decided "to remain alert to and work to prevent any proposed, feasible developments." *Ibid.* The Government did that because any buildings, any development on BWPA's property compromised national security. By preventing proposed, feasible development, the Government achieved its objective--a security buffer zone for the public good in the interest of national security. BWPA lost the economic benefit of being able to derive any income from its property. That establishes a taking.

It is ludicrous for the Government to suggest that BWPA's property was not developed either because development was not possible or because BWPA failed to pursue development. At trial, experts testified that BWPA's proposed plans were feasible, that the zoning was appropriate throughout the entire time frame for

the zoning was appropriate throughout the entire time frame for BWPA's proposed development, that there was adequate water and sewer, adequate traffic capacity, and a large market for BWPA's development.

Each of the Government's recitations with respect to BWPA's failure to proceed to develop omits one major overwhelming fact. Each time BWPA was successful in obtaining approvals for development, the immediate and inevitably recurring response of the Federal Government was to summon the Government's resources to stop BWPA's plans in its tracts. In 1967 when BWPA had the water sewer approval, the Government interfered with BWPA's plans for development first by negotiating to exchange property, then by threatening to purchase, then by threatening to condemn. In 1971 when BWPA obtained sketch plan approval, the Government announced that it had a Congressionally approved project to take 75 acres of BWPA's property, the first area slated for development. Then when BWPA redrew its plans, the Government then tried to impose first one height easement and then another; both of which would have made

had another sewer approval the Government again determined that it needed to acquire some interest in the property. In 1985-86 when BWPA had successfully negotiated the water/sewer joint venture and obtained a single building permit for a totally different portion of the property, once again the Government determined that it needed to acquire precisely the portion of the 255 acres that BWPA had approval to develop. The Government's consistent and inevitable response to any development approvals obtained by BWPA was to block or delay BWPA's every chance for development–all with the Government's secret agenda being to prevent any proposed feasible development. *Ibid.*

The Government's suggestion that BWPA never went forward with its development because it simply chose not to do so, is a flagrant lie. Each time BWPA got approvals, the Government's immediate response was to threaten to acquire some other interest in the property. The Government's threats to acquire some interest in the property were not vacant threats; the record reflects that at all time germane to this action the Director of NSA had authority to acquire the property because any development on

the property posed a threat to national security. It is outrageous for the Government to argue that BWPA's failure to proceed with development in the face of the Government's adamant threats to acquire the property indicates that BWPA did not pursue development.

It is also only a half truth for the Government to say that "Consultants' reports and expert testimony indicated that, at the time of the condemnation, it would still have taken petitioner several years to complete the lines needed to serve its development." *Id.* at 4. In 1987 the Government had already for twenty years been working "to prevent any proposed, feasible developments". *Id.* at 3. The Government neglects to mention that, had the Government not spent a year and a half interfering with BWPA's development plans beginning in 1968, the water and sewer system would have been in place by 1970. The Government also does not tell the Court that the experts also testified that but for the Government interference throughout the years there would have been full scale development on the site by the time the Government formally took the property on October 19, 1987.

REPLY TO ARGUMENT

The Government argues that

> Petitioner's arguments amount, in essence, to a scattershot attack on the factual findings of the Court of Federal Claims. Unless the actions of the federal government *caused* petitioner to fail to develop its property, petitioner cannot possibly establish a taking, no matter what the economic consequences of the failure to develop and no matter what the nature of the challenged government action.

Id. at 7.

BWPA asserts that is absolutely wrong. Under the test in *Connolly v. Pension Guar. Corp.*, 475 U.S. 211, 225 (1986), the court is required to look at the extent to which the government action interfered with the landowner's investment-backed expectations. The Court's finding that the Government could achieve its security objective by restricting building heights or secretly determining that the only buildings with public access could be built exceeded the restriction imposed on the Willard Hotel in *Benenson*. *Benenson v. United States*, 548 F.2d 939, 943 (Ct.Cl.1977). In *Benenson*, the property could have continued to be used as a hotel, had the owners been willing to pay for improvements that were

necessary to make the hotel viable and competitive. *Ibid.* The court in *Benenson* agreed that large scale investment in a structure slated for razing was unsound. How was the dilemma faced by Benenson different from that faced by BWPA? Would investment of close to a million dollars be sound when the Government says it will only pay $2 million for unimproved land? Does it makes sense to become liable for $5.5 million when the Government says the Government will not compensate the landowner for the expenditure?

The Government states "[t]he Court of Federal Claims acknowledged petitioner's argument that 'the totality of the government's actions' had effected a taking". Gov. Op. at 12. The trial in the lower court was bifurcated, it was only a trial on liability--not on damages. BWPA could not introduce evidence of its specific economic losses--that was beyond the scope of the trial. The only issue was whether the totality of the Government actions interfered with BWPA's property rights.

The seven questions raised in our original petition for certiorari still stand and are valid. Where the Government engages

in a deliberate course of conduct designed to ensure that no buildings are built on a landowner's undeveloped property, a taking has occurred for which the Fifth Amendment mandates compensation.

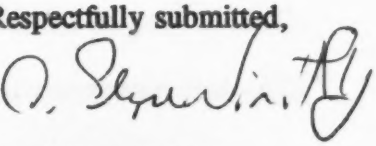
The Government succeeded for over 19 years in maintaining a 255 acre security buffer by preventing proposed, feasible development in furtherance of the Government's national security objectives. BWPA lost the economic benefit of being able to improve its property because the Government was continuously working to prevent proposed, feasible development. The court was required as a matter a law to have a trial on damages.

CONCLUSION

The petition for writ of certiorari should be issued.

DATED: March 6, 1995

Respectfully submitted,



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